IN THE COUNTY COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA
County Criminal

STATE OF FLORIDA,
Plaintiff,

Citation No. 247XEH
Division E

v.

JAMES HALL,
Defendant.
_____/

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO SUPPRESS

Defendant, James Hall, was arrested at 4:17 a.m. on November 17, 2010 on suspicion of driving under the influence of alcoholic beverage. Tampa police officer Gerard Colucci initially stopped Mr. Hall for an expired vehicle tag at 11:11 p.m. on November 16, 2010. Ofc. Colucci wrote the ticket for the expired tag in five minutes.

Upon contact with Mr. Hall, Ofc. Colucci asked Mr. Hall if had been drinking; Mr. Hall admitted that he had two drinks earlier in the evening. While Mr. Hall's responses to Ofc. Colucci's questions were allegedly slow, in his report Ofc. Colucci did *not* note any erratic driving pattern, bloodshot, watery / glassy eyes, slurred speech, thick tongue, abusive language, distinct odor of alcoholic beverage, or any other traditional clues of impairment. Despite the lack of evidence of impairment, Ofc. Colucci requested a DUI unit to respond to further examine Mr. Hall.

Tampa police officer Edwin Rivera responded to the scene at approximately midnight, nearly fifty minutes after the initial traffic stop. Ofc. Rivera claims to have smelled the distinct odor of an alcoholic beverage coming from Mr. Hall's breath in addition to bloodshot, watery / glassy eyes. It is after this initial contact that Ofc. Rivera requested Mr. Hall to perform field sobriety exercises, specifically, the Horizontal Gaze Nystagmus test, walk-and-turn, and one-leg stand. After performance of these exercises, Ofc. Rivera arrested Mr. Hall and transported him to Central Breath Testing where Mr. Hall's breath tested at 0.091 and 0.093 g/210L.

Mr. Hall was illegally detained by Ofc. Colucci without reasonable suspicion of DUI

Mr. Hall was illegally detained for nearly fifty minutes by Ofc. Colucci. A person may not be detained on a traffic stop any longer than necessary to issue a traffic citation. Creswell v. State, 564 So.2d 480 (Fla. 1990); Whitfield v. State, 33 So.3d 787 (Fla. 5th DCA 2010) ("Absent an articulable suspicion of criminal activity, the time an officer takes to write the citation should last no longer than is necessary to make any required license or registration checks and to write the ticket.") The only exception to this rule is that an officer may detain a person longer if the officer has a reasonable suspicion based on articulable facts that criminal activity is afoot. Terry v. Ohio, 392 U.S. 1 (1968).

Reasonable suspicion is something less than probable cause, but more than an inchoate and unparticularized suspicion or hunch. Id. A court must look at the totality of the circumstances in determining whether reasonable suspicion exists. Maldonado v. State, 992 So.2d 839 (Fla. 2nd DCA 2008). Reasonable suspicion is something less than probable cause, but an officer needs more than a mere hunch before he can detain a suspect past the time reasonably required to write the ticket. Id. Reasonable suspicion has been found lacking where:

> The officer testified he smelled the odor of an alcoholic beverage, observed bloodshot watery eyes, and the defendant stated he had consumed alcoholic beverages, State v. Medina-Moya, 8 Fla. L. Weekly Supp. 396c (17th Cir. Broward Cty. Ct., March 19, 2001);
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> The officer noticed red, watery eyes, smelled the odor of alcohol from defendant's breath, and defendant attempted to conceal an unopened beer but did not observe erratic driving and defendant did not have difficulty conversing with officer, State v. Ammerman, 10 Fla. L. Weekly Supp. 236b (17th Cir. Ct., May 29, 2001);
>
> There was only the odor of alcoholic beverage on breath, State v. Kliphouse, 771 So.2d 16 (Fla. 4th DCA 2000).

Reasonable suspicion has been found where:

> There was an odor of alcoholic beverage on defendant's breath, bloodshot and watery eyes, and, "most significantly," defendant had just crashed his vehicle into a parked car, DHSMV v. Possati, 866 So.2d 737 (Fla. 3rd DCA 2004);
>
> The defendant was stopped for speeding at 4 a.m., defendant had odor of alcohol on breath, bloodshot, glassy eyes, defendant admitted to consumption of alcohol, and officer observed HGN prior to request of additional field sobriety exercises, State v. Ameqrane, 39 So.3d 339 (Fla. 2nd DCA 2010).

Mr. Hall was detained for fifty minutes while awaiting the arrival of Ofc. Rivera. It took Ofc. Colucci a mere five minutes to write the citation for expired tag and assuming, *arguendo*, that it would take an additional ten minutes to ask for license and registration, Mr. Hall was detained illegally for at least thirty-five minutes. *See* State v. Schepp, 16 Fla. L. Weekly Supp. 766a (12th Cir. Sarasota Cty. Ct., December 12, 2008) (While delay was only a couple of minutes, illegal detention occurred where stop officer was awaiting DUI investigator to arrive and not arresting defendant or furthering investigation.) *affirmed* State v. Schepp, 16 Fla. L. Weekly Supp. 733a (12th Cir. Ct., May 14, 2009).

Furthermore, Ofc. Colucci lacked reasonable suspicion to detain Mr. Hall longer than the time necessary to issue a traffic citation. The only evidence of impairment possessed by Ofc. Colucci when he called for Ofc. Rivera was an admission of drinking and allegedly slow responses to his questions. Prior to this encounter, Ofc. Colucci had never met Mr. Hall and is not aware of his normal response time to

questions. Additionally, an admission to some consumption of alcohol does not prove any impairment. In each of the cases cited above where a court did find reasonable suspicion, there is at least one clue of impairment in addition to odor of alcohol and bloodshot watery eyes. In this case, we don't even have an odor or bloodshot watery eyes.

Even assuming those factors are present, it still does not give rise to reasonable suspicion of impairment. *See* State v. Medina-Moya, 8 Fla. L. Weekly Supp. 396c (17th Cir. Broward Cty. Ct., March 19, 2001). In order for Ofc. Colucci to have had a reasonable suspicion of impairment he an additional clue such as erratic driving, slurred speech, observation of HGN, a crash, fumbling with driver's license, staggering upon exit of vehicle, using vehicle for support, etc. He simply did not possess the requisite level of suspicion to detain Mr. Hall longer than necessary to write a ticket. Therefore, any evidence obtained subsequent to this illegal seizure must be suppressed.

Ofc. Rivera lacked reasonable suspicion of DUI to request FSEs and / or lacked probable cause to compel FSEs

There are three baselines to consider when evaluating whether the request to or forcing of Defendant to perform field sobriety exercises is proper: (1) if an officer does not possess reasonable suspicion of DUI, that officer cannot even request field sobriety exercises; (2) if an officer possesses reasonable suspicion but lacks probable cause of DUI, that officer can request but cannot compel performance of field sobriety exercises; and finally (3) if an officer possesses probable cause of DUI, that officer can compel performance of field sobriety exercises. State v. Carney, 14 Fla. L. Weekly Supp. 287a (13th Cir. Hillsborough Cty. Ct., December 7, 2006) (court found officer compelled FSEs with statement, "Sir, I'm going to have you perform...field..." but compulsion was proper where deputy observed consistent weaving within lane for over one mile, defendant did not immediately pull over, odor of alcohol from vehicle, eyes were glassy, face flushed, speech slurred, defendant swayed slightly while standing, and defendant admitted to alcohol consumption and that it could have affected his driving."

The burden rests with the State to prove that a defendant has freely, knowingly, and voluntarily consented to the administration of field sobriety exercises. State v. Jackson, 16 Fla. L. Weekly Supp. 431b (2nd Cir. Leon Cty. Ct., September 24, 2008).

In this case, Ofc. Rivera indicated in his report more clues of impairment than did Ofc. Colucci, to wit: odor of alcoholic beverage from Mr. Hall's mouth, bloodshot, watery / glassy eye, and admission to two drinks. However, as previously explained, even these factors do not give rise to reasonable suspicion of driving under the influence. While this may be some evidence of consumption, it is not evidence of impairment such as slurred speech, impaired motor skills, erratic driving, etc. As such, Ofc. Rivera lacked reasonable suspicion to even request Mr. Hall to perform field sobriety exercises.

Additionally, Ofc. Rivera failed to even make a request to Mr. Hall; instead, he commanded Mr. Hall to perform field sobriety exercises. His statement that "I'm going to have you do..." is clearly a directive and not a request. *See* State v. Miller, 17 Fla. L. Weekly Supp. 377a (4th Cir. Duval Cty. Ct., December 16, 2009) (officer's statement that he needed defendant to perform some exercises was a directive and consent was merely acquiescence to police authority.) If Ofc. Rivera didn't have reasonable suspicion to request performance of field sobriety exercises, he clearly lacked probable cause to command their performance.

As such, Defendant respectfully requests this Court to suppress all evidence arising after the illegal detention of Mr. Hall by Ofc. Colucci or, should this Court find the initial detention legal, to suppress all evidence arising after the command given to Mr. Hall to perform field sobriety exercises.

I certify that a true and correct of this memorandum was furnished to the Office of the State Attorney, 419 N. Pierce St., Tampa, Florida 33602 on this 29th day of March, 2011 via facsimile to 813.274.1976.

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